eme Court of the United States

OCTOBER TERM, ~~1952~~ 1953

Nos. ~~765-769~~ 51-55

UNITED STATES OF AMERICA,
Petitioner,
51
versus
HENRY DEBROW,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,
versus
52
JAMES H. WILKINSON,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,
versus
53
ROY F. BRASHIER,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,
versus
54
CURTIS ROGERS,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,
versus
55
FORREST B. JACKSON,
Respondent.

NTS' BRIEF IN OPPOSITION TO PETITION FOR OF CERTIORARI TO THE UNITED STATES COURT PEALS FOR THE FIFTH CIRCUIT.

W. S. HENLEY,
R. W. THOMPSON, JR.,
ALBERT SIDNEY JOHNSTON, JR.,
BEN F. CAMERON,
— Counsel for Respondents.

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IN THE SUPREME COURT OF THE UNITED STATES

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The Question Presented is more accurately stated as follows:

Whether a perjury indictment is subject to dismissal because of its failure to allege the identity of the person

who administered the oath either by *naming him or giving the office held or the authority possessed by him* when the "tribunal" is *not a court of justice* but a senate sub-committee.

I.

The Petition does not disclose any "special and important reasons" for its allowance under Rule 38.

1. No prejudice results to the government from the decision of the Court of Appeals for the Fifth Circuit, either with respect to these prosecutions or the others listed at pages 6-7 of the Petition. No statute of limitations has run or threatened to run, and the cases can be presented to the Grand Jury again.

2. The decision of the court below can be satisfied by the addition of a simple phrase so as to conform these indictments to that which the government used in the case of *United States v. Meyers*, 75 F. Supp. 486, aff. 171 F(2) 800, cert. den. 336 U. S. 912, 93 L. Ed., 1076. The reported decision of that case (75 F. Supp. 487) states: "The indictment alleges that the oath in this instance was administered by Honorable Homer Ferguson, a member of the United States Senate, as Chairman of a Sub-committee." The government used that form of indictment long after the effective date of the rules of Criminal Procedure.

3. The decision of the court below does not conflict with that of any other circuit. The *Bickford* case (168 F (2) 26) involved an indictment which charged that the

defendant had "taken an oath as a witness before the said District Court which was *administered by the Clerk of the said court . . .*" (Emphasis supplied here and elsewhere unless otherwise stated).

In *United States v. Polakoff,* 122 F. 888, the name of the officer charged to be influenced was not of the essence of the crime. It was a violation of the law to impede and influence any officer. The identity of the officer in the case before the Court is essential so that the Court might see for itself whether the officer had authority under federal statutes to administer an oath.

4. The question raised by the Petition does not embrace a novel matter of peculiar public interest relating to the construction of Rule 7 (c). The question involves primarily the determination of what are the essential elements of the crime of perjury, as a matter of substantive law. Everybody agrees that Rule 7 (c) requires that the indictment set forth every essential *fact* going to make up the charge of perjury.

II.

The essential ingredients of perjury include an oath administered by a person having authority to administer it, and a willful statement concerning a material fact contrary to such oath, 18 U. S. C. 1621. That these are minimum ingredients of the crime of perjury has been accepted since the foundation of the Republic, and has never been questioned in an appellate court prior to these proceedings. No reported case from an appellate court has upheld an indictment which failed to charge those

essential facts. The history of the development of our jurisprudence shows that the necessity for so charging is deeply embedded in the law.

1. **At Common Law.** This Court held in *United States v. Curtis*, 107 U. S. 671, 27 L. Ed., 534, that perjury cannot be charged at common law or under federal statutes based on "an oath before one who has no legal authority to administer oaths of a public nature, or before one who, although authorized to administer some kind of oaths, but not the one which is brought in question."

In addition to those ingredients listed as essential, *supra*, the common law required the prosecutor "to set out in the indictment the title of the cause in which the witness was sworn and testified, the record and all of the pleadings therein, thus disclosing jurisdiction and the issue, as a guide to the determination of the question whether the testimony of the witness charged to be false were material. The commission of the officer before whom the oath was taken was also set out". *Danaher v. United States* (Eighth Circuit) 39 F (2) 325, 326. To eliminate the exhibiting of so voluminous a record, Congress dealt with the subject by statute.

2. **Common Law as Abridged by Statute.** By the Crimes Act of April 30, 1790, Congress mitigated the rigors of the common law rule by adopting the English statute, 23 Geo. II, Chap. 11; *Markham v. United States*, 160 U. S. 319, 324, 40 L. Ed. 441, 443. This statute was carried as Rev. Stat. 5396, 18 U. S. C. 558, and remained, as originally passed, a part of the Criminal Code until the recodification of 1948.

That statute accepted and recognized the requirements of the common law that the indictment should set forth, ". . . by what court and *before whom the oath was taken, averring such court or person to have competent authority to administer the same*. . .."; and effected reforms with respect to two features of the common law requirements. The first of these made it possible for the government to set forth "the substance of the offense charged upon the defendant". The *Markham* case quotes Chitty's Criminal Law and other authorities (160 U. S. 324-5) holding that the gist of this feature of this reform was that it made it possible to charge that the false swearing was about a material matter without setting forth the details of its materiality.

The other reform embraced in the remedial statute relieved the government from bringing forward with its indictment the entire record of the proceeding in which the defendant had testified, this being the excluding language: ". . . without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or in equity, or any affidavit, deposition, or certificate, other than as hereinbefore stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed". Only in these two particulars did the statute essay to abridge common law requirements with respect to perjury indictments.

3. **Decisions of the Courts.** Beginning with this Court's decision in 1895 in the *Markham* case, every appellate court which has spoken on the subject has ap-

4. The Ingredients of Perjury Have Never Varied. No statute dealing with the facts constituting perjury has been repealed. The statute defining perjury, 18 U. S. C. 1621, is in the same language today as when the *Markham* case and all of the others were decided. Perjury consists of the same structure of facts today as then. The sole duty performed by the District Court and the Court of Appeals in the present cases was to lay the facts of these indictments alongside these established principles of law to discover whether those facts charged the substantive crime of perjury.

If these essential facts were not charged, the indictment was condemned by Rule 7 (c), whatever construction might be placed upon the meaning and function of that rule.

III.

Effect of Repeal of R. S. 5396, 28 U. S. C. A. 558.

1. The repeal of a statute whose only mission was to minimize the requirements of an indictment does not carry the presumption that those minima were further diminished. It is more logical to conclude that Congress intended to abolish those minimum requirements and relegate draftsmen of indictments to the sterner requirements of the law as it existed without the statute.

The prime efficacy of 28 U. S. 558 lay in the things it permitted the government to leave out of an indictment. It granted leave that an indictment might contain the substance of the materiality of the false swearing,

omitting the details, and might omit entirely the pleadings and record of proceedings and the commission of the person before whom the oath was taken.

It is rather to be assumed, therefore, that Congress felt free to leave that statute out of the revised code because it was assured that the courts would, under Rule 7 (c), grant to the government the right to omit from the indictment those things which the language of the statute had stamped as non-essential.

There is no ground at all for the assumption that Congress intended that the courts applying Rule 7 (c) should exempt the government from the necessity of charging all of the essential facts of perjury which had been accepted as standard throughout the life of the nation, and which Section 558 recognized as established substantive law.

2. The most significant thing that can be said of Section 558 is that its acceptance of the requirement that a perjury indictment must set forth "by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same," and its reenactment unchanged for more than a century and a half, helped to crystalize the quoted requirement into a principle of law of universal acceptance.

3. There is no merit, therefore, to the government's contention that the omission of Section 558 from the recodification of 1948, and the supposed substitution of Rule 7 (c) for it carries the presumption that Congress intended to reject entirely the legal principle so long

recognized by the statute. Quite the contrary is true under the holding of this Court in *Morisette v. United States*, 342 U. S. 246, 96 L. Ed., 288.

Under consideration there was the effect of the omission of intent from the recodification of the law against embezzlement, larceny, and similar crimes Congress had effected in the new statute, 18 U. S. C. 641. Morisette had contended that "both the indictment and the statute require proof of felonious intent". The Court of Appeals of the Sixth Circuit rejected that contention, 187 F (2) 427, 429, holding that it was the manifest purpose of Congress to drop intent as an ingredient of the offense. That Court held the indictment good under Rule 7 (c), feeling that "the federal courts long ago abandoned the course of reversing conviction for crime on the technical niceties of pleadings".

This Court reversed, using language of similar import to that employed by the District Court in its opinion in this case (R. 13):

> "As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle, but merely recognized that intent was so inherent in the idea of the offense that *it required no statutory affirmation*. . . .
>
> "And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken, and the meaning its use will convey to

the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as *satisfaction with widely accepted definitions, not as a departure from them. . .*"

IV.

1. **Indictment May Not Proceed by Presumption or Implication.** Facts cannot be supplied by the use of a legal conclusion expressed by an adverb such as "duly". It is significant that both the dissenting opinion and the Petition lay great stress on the use of this word. The very fact that they feel called upon to fall back on the use of this word concedes that essential facts are missing which they conceive this adverb supplies.

The use of "duly" connotes that the draftsmen of the indictment looked at certain facts, and considered that they spelled out such propriety of action that he could characterize them by the use of that word. The law requires that the *facts* appear in the indictment so that the defendant may know them and that the court may judge them. It is universally accepted that legal conclusions cannot take the place of facts, and nobody suggests that Rule 7 (c) changes this principle. *United States v. Hess*, 124 U. S. 483, 31 L. Ed. 516; *Alabama Packing Company v. United States*, (Fifth Circuit) 167 F (2) 179; *Johnson v. United States*, (Ninth Circuit) 294 F. 753; *United States v. Martin*, (Third Circuit), 36 F (2) 944, cert. den. 281 U. S. 736, 74 L. Ed., 1151; *Cooper v. United States*, (Second Circuit) 299 F. 483; *United States v. Cruickshank*, 92 U. S. 542.

2. The Petition does not disguise its reliance upon implication to supply the important *fact* of the identity of the officer administering the oath. At page 9, it argues that the indictment charged a "*competent*" tribunal and an oath "*duly* administered", "necessarily *implying* administration of the oath by an authorized person." The adjective, competent, and the adverb, duly, are expressions of opinion, not statements of *facts*.

It is important that the person giving the oath be identified. The oath is the foundation of the prosecution. Federal oaths are statutory only, and the authority to administer the particular oath must affirmatively appear from the indictment. *United States v. Curtis, supra.* The authority to give the oath may not be implied. "Legislation may proceed by impliication but good pleading may not". *Robertson v. U. S.* (Fifth Circuit) 168 F (2) 294 and cf. *U. S. v. Carll*, 105 U. S. 611, 26 L. Ed., 1135, and *United States v. Hess, supra.* No presumption of regularity could attend the giving of an oath under a statutory body of limited and transient jurisdiction such as a congressional committee.

3. Particularly is the identity of the person giving the oath here important since the chief justification offered by the government for dispensing with this is the use of the word "tribunal". Both Webster's Unabridged Dictionary and Black's Law Dictionary define a tribunal as a *Court of Justice.* The words of Judge Holtzoff in the recent case of *United States v. Meyers, supra,* are applicable (75 F (2) 487):

> "The Court has considerable doubt whether a congressional committee is a tribunal, because the word

'tribunal' implies an officer or body having authority to adjudicate matters. But . . . it is not necessary to determine whether a congressional committee is a tribunal, because the statute . . . includes an oath taken before an officer or any other person authorized to administer oaths. The indictment alleges that the oath in this instance was administered by Honorable Homer Ferguson, a member of the United States Senate, as Chairman of a Sub-committee."

4. The government seeks to sustain these indictments mainly on the argument that the court should presume that the oath was administered by a proper officer because it was before a tribunal thought to be competent. Moreover, the government leans heavily on the dissenting opinion (R. 25) which not only gives much weight to the legal conclusion expressed by "duly", but implies knowledge on the part of the defendants, e. g., "In all probability, the defendants knew which Senator acted."

If the presumption of innocence and lack of knowledge on the part of the defendants is to be laid aside, one could, with equal logic, speculate that the defendants probably knew the identity of the tribunal and also what they had sworn. The use of such an expedient would make it difficult to establish that any particular fact is an essential fact.

V.

Effect of Rule 7 (c) Misconstrued.

Rule 7 (c) is not entitled to be construed as having an effect as cataclysmic as that with which the government

seeks to invest it. It did not spring "full-fledged" from the mind of Congress as Pallas is reputed to have sprung from the head of Jove. It is rather the synthesis of its prototype, 18 U. S. C. 556, plus the evolution wrought by the courts under it. This Court had long since sanctioned a departure from "the rigor of old common law rules of criminal pleading" in a line of cases of which *Hagner v. United States,* 285 U. S. 427, 76 L. Ed., 861 is an example. The Court of the Fifth Circuit had been in the forefront of those which were studious to deny to defendants "A vested right in the veteran absurdities of criminal procedure", *Whitehead v. United States,* (1917) 245 F. 385. And see *Wilson v. United States,* 158 F (2) 659; cert. den. 330 U. S. 850; *Robertson v. United States, supra,* and *Parsons v. United States,* 189 F (2) 252.

Every article or statement of a text writer on the subject winds up with some such statement as: "Every ingredient or essential element of the offense should be alleged". 4 Baron and Holtzoff Federal Practice and Procedure, 63-4.

CONCLUSION.

The indictment represents the solemn findings of a grand jury based presumably on facts established by evidence. Respondents are entitled to have the grand jury consider evidence and adjudge whether they were sworn by an officer with authority. They ought not to be compelled to face a trial jury on the mere conclusions of the draftsmen of the indictment. Their rights under

the Sixth Amendment can be protected without prejudicing the position of the government in these or any other prosecutions.

The Petition should be denied.

Respectfully submitted,

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